BEFORE THE PUBLIC UTILITIES COMMISSION
OF THE STATE OF CALIFORNIA

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Pacific Bell Telephone Company d/b/a AT&T California (U 1001 C), Complainant v. Cbeyond Communications, LLC (U 6446 C), Covad Communications Company (U 5752 C), and Arrival Communications (U 5248 C), Defendants	Case No. 06-03-023

REPLY BRIEF OF AT&T CALIFORNIA (U 1001 C) ON DISPUTED WIRE CENTER ISSUES

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INTRODUCTION AND SUMMARY

As AT&T California anticipated in its opening brief,[1] the CLECs contend that the Commission should "err" on the side of finding continued impairment, so as to ensure continued CLEC access to UNEs.[2] The Commission should do no such thing. Quite apart from the fact that the CLECs' suggestion is out-of-keeping with the established principle that overbroad unbundling is affirmatively harmful to competition,[3] the FCC rules at issue here are clear and unbiased. The Commission's task is to apply those rules to the record before it, not to tilt the inquiry in one direction or another.

Fiber-Based Collocators. The CLECs' position on whether cross-connected carriers are eligible to be counted as fiber-based collocators is based primarily on a single, flawed proposition: that, to count as a fiber-based collocator under the FCC's rule, a carrier must have *itself* invested the capital necessary to deploy fiber transport. In the CLECs' view, only a carrier that has made that investment demonstrates that deployment is economically feasible and that, therefore, CLECs are not impaired without unbundled access to ILEC facilities.

The CLECs' position cannot be squared with the *TRRO* or the FCC's implementing rule. Most fundamentally, nothing in the text of the FCC's rule requires that a carrier "own," "deploy," or even "invest in" the transmission facility that it uses to transport traffic into and out

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[1] *See* Opening Brief of AT&T California (U 1001 C) On Disputed Wire Center Issues, at 5-6 (filed Oct. 20, 2006) ("AT&T Initial Br.").

[2] *See* Opening Brief of Cbeyond Communications, LLC (U 6446 C), Covad Communications Co. (U 5752 C), XO Communications Services, Inc. (U 5553 C), Mpower Communications Corp. (U 5859 C), and U.S. Telepacific Corp. (U 5721 C), at 1-3, 6 (filed Nov. 13, 2006) ("CLEC Br.").

[3] *See*, *e.g.*, *United States Telecom Ass'n v. FCC*, 359 F.3d 554, 576 (D.C. Cir. 2004) ("*USTA II*") ("the purpose of the Act is not to provide the widest possible unbundling"; unbundling can hinder the "genuine, facilities-based competition" that is the 1996 Act's central goal), *cert. denied*, 543 U.S. 925 (2004); Order on Remand, *Unbundled Access to Network Elements; Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*, 20 FCC Rcd 2533, ¶ 2 (2005) (overbroad unbundling can "frustrate sustainable, facilities-based competition") ("*Triennial Review Remand Order*" or "*TRRO*"), *aff'd*, *Covad Communications Co. v. FCC*, 450 F.3d 528 (D.C. Cir. 2006).

of the wire center. Rather, to count as a fiber-based collocator, the carrier must "*operate*" that facility, which is precisely what a cross-connected carrier does.[4] Beyond that, the FCC has made clear – in a statement AT&T California featured prominently in its opening brief and the CLECs ignore – that its rules presume "that competitive LECs . . . take advantage of existing alternative facilities deployment where possible."[5] And the FCC also made clear that carriers that obtain access to dark fiber via the Verizon CATT arrangement – which the record makes clear is functionally identical to the arrangements at issue here – count for purposes of its rule. If carriers that obtain access to a third party's dark fiber via a CATT arrangement count under the FCC's rule, it simply cannot be that, as the CLECs claim, a carrier must have deployed its own fiber to qualify as a fiber-based collocator.

Data Vintage. The CLECs' position on data vintage is likewise predicated on a single, flawed proposition: that AT&T California relies on the data available as of March 11, 2005 because that was the effective date of the *TRRO*.

In fact, as AT&T California explained in detail in its opening brief – and as the CLECs again ignore – AT&T California relies on the data available as of March 11, 2005 because that was the effective date of its wire center designations. It is as of that date, moreover, that the CLECs claimed they were entitled to UNEs in the wire centers at issue. And it is back to that date that the CLECs will be required to pay a true-up, to the extent AT&T California's designations are upheld. Contrary to the CLECs' position, the question presented here is thus not whether the wire centers meet the FCC's non-impairment thresholds today, but rather whether AT&T California correctly designated them as non-impaired as of March 11, 2005. And that question can only be answered with reference to the facts as they existed at the time.

[4] 47 C.F.R. § 51.5 (emphasis added).

[5] *TRRO* ¶ 28.

Business Lines. With respect to business line counts, the CLECs contend that DS1 UNE loops should be counted using a back-of-the-envelope "utilization factor" of 50% that would count each such loop as 12 business lines. But the CLECs do not, because they cannot, come to grips with the plain language of the FCC's rule, which specifically states that "a DS1 line corresponds to 24 64 kbps-equivalents, and therefore to 24 'business lines.' "[6] As a federal district court recently explained in upholding the Texas commission's decision to apply that rule as written, the FCC's rule "is unqualified and suggests no exceptions or limitations."[7] Indeed, as AT&T pointed out in its initial brief – and as the CLECs again ignore – numerous CLECs, including one that is a party here, asked the FCC to reconsider its line-counting rule specifically *because* it requires DS1 UNE loops to be counted as 24 business lines.[8] The CLECs' position here is fatally inconsistent with that request.

[6] 47 C.F.R. § 51.5.

[7] Order, *Logix Communications L.P. v. Public Util. Comm'n of Texas*, Case No. A-06-CA-548-SS, slip op. at 7 (W.D. Tex. Nov. 6, 2006) ("Texas Decision") (attached hereto as Reply Exh. 1). The court also denied reconsideration in an order dated Nov. 15, 2006 (attached hereto as Reply Exh. 2).

[8] *See* Petition for Reconsideration at 10-21, 26, *Unbundled Access to Network Elements; Review of Section 251 Obligations of Incumbent Local Exchange Carriers*, WC Docket No. 04-313 & CC Docket No. 01-338 (FCC filed Mar. 28, 2005) ("CLEC Petition for Reconsideration") (attached to Chapman Rebuttal Testimony). As AT&T California has explained, XO – a member of the California "Joint CLECs" – is one of the CLECs that filed this petition.

DISPUTED ISSUES

I. *Fiber-Based Collocators*: How should Fiber-based Collocators ("FBCs") be counted under the FCC's definition of "Fiber-based collocator" in 47 C.F.R. § 51.5 and applicable orders?

A. Are there instances in which the Commission should count as an FBC a connecting carrier who uses a collocation-to-collocation cross-connect to access fiber capacity from the second collocator as a separate FBC (*i.e.*, in addition to the collocation of the second collocator)? If so, what are the circumstances in which such connecting carriers should be counted as an FBC?

A "fiber-based collocator" is a carrier that "maintains a collocation arrangement in an incumbent LEC wire center, with active electrical power supply, and operates a fiber-optic cable or comparable transmission facility that (1) Terminates at a collocation arrangement within the wire center; (2) Leaves the incumbent LEC wire center premises; and (3) Is owned by a party other than the incumbent LEC or any affiliate of the incumbent LEC, except as set forth in this paragraph."[9] Cross-connected carriers satisfy these terms. In particular, as AT&T California has explained, a cross-connected carrier not only can but must "operate" a transmission facility in order to have a viable network.[10] Provided the carrier also satisfies the remaining requirements of the FCC's rule, it counts for purposes of the FCC's test.

Moreover, the *TRRO* states that the term "fiber-based collocators" includes carriers with "less traditional collocation arrangements," such as "Verizon's CATT fiber termination arrangements."[11] The Verizon CATT arrangement allows carriers with collocation arrangements

[9] 47 C.F.R. § 51.5.

[10] *See* AT&T Initial Br. at 19-21; Nevels Rebuttal at 9 ("A CLEC that is cross connected to another CLEC is operating, running or controlling a facility that is capable of realizing a DS3 level of transmission from that carrier's collocation arrangement, out of the wire center to the rest of its network."); Chapman Rebuttal at 49-50.

[11] *TRRO* ¶ 102.

in a central office to lease strands of dark fiber from a third-party dark fiber provider.[12] Just as the users of the Verizon CATT arrangement are fiber-based collocators under the FCC's rule, so too are the cross-connected collocators that AT&T has counted here.[13]

1. The CLECs' primary response focuses on the fact that a cross-connected carrier has not *itself* deployed competitive fiber transport facilities that leave the wire center. In the CLECs' view, the purpose behind the FCC's rule is to identify only those carriers that have themselves deployed high-capacity transport.[14] Because a cross-connected carrier "that has no fiber of its own" does not provide such evidence of competitive deployment, the theory goes, such a carrier is not eligible to count as a fiber-based collocator.[15]

As AT&T California has already explained, however, the FCC's rule looks at the number of fiber-based collocators, not at the number of independently-owned fiber transmission facilities. If the FCC had wanted a rule that measured the latter, it would have said so directly. But the FCC said exactly the contrary, explaining that its rules "presume[] that competitive LECs will use reasonably efficient technologies *and take advantage of existing alternative facilities deployment*

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[12] *See* Exh. 15 (Affidavit of Robert Riordan (Metromedia Fiber Network Services, Inc.)), attached to Comments of NuVox Inc., *et al.*, *Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*, CC Docket Nos. 01-338 *et al.*, ¶ 6 (FCC filed Apr. 5, 2002) ("Exh. 15 (Riordan Aff.)") (cited in Report and Order and Order on Remand and Further Notice of Proposed Rulemaking, *Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*, 18 FCC Rcd 16978, ¶ 406 n.1257 (2003) ("*Triennial Review Order*" or "*TRO*") (subsequent history omitted)); Nevels Direct at 10-11; Nevels Rebuttal at 10.

[13] *See* AT&T Initial Br. at 18; Nevels Rebuttal at 11 ("[A]s a practical matter the kind of collocation-to-collocation arrangement I have discussed is no different" from the Verizon CATT arrangement.).

[14] CLEC Br. at 27.

[15] *Id.* at 28; *see also id.* at 30 ("Carriers who simply cross-connect to use that same fiber, do not provide another alternative fiber route, and have, by purchasing capacity from the other carrier, shown exactly the opposite of economic feasibility."); *id.* at 55; *id.* at 65 ("the objective of the FCC's unbundling framework, which is to determine where competitive deployment of transmission ***facilities*** is economically feasible – not to determine where ***capacity*** is available on those facilities").

where possible."[16] Moreover, as noted, the FCC specifically identified the Verizon CATT arrangement as a scenario that counts under its fiber-based collocation rule; as AT&T has emphasized, in that arrangement, the cross-connected carrier relies on fiber deployed by another carrier in a manner that is, in all material respects, indistinguishable from the circumstances presented here.[17]

The CLECs have no tenable response to either point. Indeed, as to the first, the CLECs do not even acknowledge, much less attempt to explain, the FCC's statement that its rules presume that CLECs will "take advantage of existing alternative facilities deployment where possible."[18] That silence is telling. A cross-connected carrier is, by definition, "taking advantage of alternative facilities deployment." The CLECs' suggestion that such a carrier does *not* count under the FCC's rules – specifically because it is doing something that the FCC presumed it would – is impossible to fathom.

As to the Verizon CATT arrangement, the CLECs now contend – in contrast to their position in their opening statement[19] – that it is only the *wholesale* provider of fiber, not the carrier that cross-connects to the wholesale provider, that counts, and that the FCC's statement approving the CATT arrangement was necessary only because that wholesale provider does not itself establish a "collocation" arrangement.[20] But, as AT&T has explained, it cannot be the case that the wholesale provider in the CATT arrangement counts as a "fiber-based collocator,"

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[16] *TRRO* ¶ 28 (emphasis added).

[17] *See TRRO* ¶ 102. The fact that AT&T does not literally offer a CATT arrangement, *see* CLEC Br. at 52, is irrelevant. The point is that the cross-connect scenarios presented here are, from a practical perspective, virtually identical to the CATT arrangement. *See* AT&T Initial Br. at 18.

[18] *TRRO* ¶ 28.

[19] *See* AT&T Initial Br. at 17-18 & n.68 (citing Transcript Vol. 1, at 45 (Oct. 4, 2006) ("CLEC A [*i.e.*, the collocator] lights it – can either light it, or it can be lit, but nonetheless CLEC A then becomes the operator of that particular fiber")).

[20] *See* CLEC Br. at 51-54.

because the wholesale provider does not "terminate," much less "operate," the fiber that it leases to other carriers. As Ms. Chapman explains, "the CATT provider does not sell transport capacity. It leases dark fiber. The CATT provider may also operate fiber, but it does not operate the fiber it leases to other carriers under a CATT arrangement."[21] Ms. Chapman's testimony is confirmed by the affidavit that is the sole support for the FCC's reference to the Verizon CATT arrangement.[22] In that affidavit, a wholesale provider named MFN explained that the CATT arrangement "provides CLECs with access to MFN's dark fiber backbone network," that the CATT arrangement allows MFN to provide fiber "*without* having to 'light' the fiber with expensive optical-electrical conversion equipment," and that the fiber is "distributed as dark fiber on an as-needed basis to collocated CLECs."[23] In short, in a CATT arrangement, the wholesale provider does nothing more than provide a strand of dark fiber to the cross-connected CLEC, and it is the cross-connected CLEC that "terminates" (*i.e.*, lights) and then "operates" that strand, and that therefore counts for purposes of the FCC's rule.[24]

Once it is established that the cross-connected collocators in a CATT arrangement are eligible to be counted as fiber-based collocators, the CLECs' other arguments – that cross-connected carriers did not deploy and do not own the fiber that leaves the wire center[25] – serve to

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[21] Chapman Rebuttal at 62.

[22] *See TRRO* ¶ 102 n.294 (citing *TRO* ¶ 406 n.1257 (in turn citing the affidavit that is included in this record as Exhibit 15)).

[23] Exh. 15 (Riordan Aff.) ¶ 6 (emphasis added). The CLECs are therefore incorrect in claiming (at 51) that there is no record evidence to support AT&T's observation that the Verizon CATT arrangement involves dark fiber.

[24] The CLECs also err in claiming that if the Verizon CATT arrangement involves dark fiber, it could not count as a "fiber-based collocator" unless it includes an indefeasible right of use. *See* CLEC Br. at 51-52. As AT&T explained in its opening brief and reiterates below, *see infra* pp. 14-15, the IRU requirement applies only where the dark fiber is obtained from *the ILEC*, not from a third party. *See* 47 C.F.R. § 51.5.

[25] *See* CLEC Br. at 52.

prove AT&T California's point. That is, the FCC specifically approved a scenario in which a collocated carrier cross-connects to and operates a transmission facility that was deployed by (and is owned by) a separate carrier. The CLECs' core argument here – that a carrier cannot count for purposes of the FCC's rule unless it has itself expended the resources necessary to deploy fiber leaving the wire center – is therefore incorrect.

2. The CLECs emphasize that, in its ongoing effort to gain FCC approval of the proposed AT&T-BellSouth merger, AT&T proposed to exclude cross-connected carriers from the count of fiber-based collocators.[26] According to the CLECs, this proposal proves that the FCC "intended that fiber-based collocator counts exclude cross connecting carriers."[27] To the contrary, the very fact that the FCC believes it is necessary to extract this commitment from AT&T and BellSouth confirms that the current FCC rules do *not* otherwise require the exclusion of cross-connected carriers. Indeed, all of the other proposed commitments in the AT&T-BellSouth merger go beyond anything that the FCC rules require (such as the commitment not to seek an increase in UNE rates from any state commission, and to donate $1 million to a public safety foundation).[28] The same is true here.[29]

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[26] *See id.* at 26-27 & n.81 (citing FCC Public Notice, Docket DA 06-0235, *Application for Consent to Transfer of Control Filed by AT&T Inc. and BellSouth Corporation*, WC Docket No. 06-74, Oct. 13, 2006, Letter from Robert W. Quinn, Jr. to FCC Chairman Kevin Martin, UNE 2(ii) ("AT&T BellSouth Merger Commitment Letter")); *id.* at 45-46 (same argument). The CLECs wrongly suggest that AT&T's proposal is binding. In fact, the AT&T/BellSouth merger remains pending at the FCC, and no conditions have been imposed by that agency.

[27] *Id.* at 26.

[28] *See* AT&T BellSouth Merger Commitment Letter at 3.

[29] The CLECs also claim that "if AT&T believed that excluding cross-connecting carriers from the fiber-based collocator count were contrary to the FCC's rules and or [sic] law, then it would not have agreed." CLEC Br. at 27. This is a *non sequitur*. One might as well say that the FCC rules affirmatively require a nationwide freeze in UNE rates, because AT&T would not otherwise have proposed such a condition in order to win approval of the merger.

3. The CLECs contend that AT&T's reliance on cross-connected carriers that obtain capacity from third parties "improperly equates 'capacity' and 'facility,'"[30] and that "the FCC never suggests that the term 'facility' should be interpreted to mean transmission capacity – not a physical facility."[31]

As a threshold matter, this point applies only where a carrier uses a cross-connect to splice into a second carrier's transmission facility and to obtain capacity on that facility. Where the cross-connected carrier obtains a strand of dark fiber and lights that fiber itself, there should be no dispute about whether leased "capacity" can be part of a transmission "facility," as the fiber strand itself constitutes the "facility" that terminates in the cross-connected carrier's cage and leaves the wire center.[32]

In any case, the CLECs are incorrect in claiming that a "facility" for purposes of the FCC's rule cannot consist in part of transmission leased from another carrier. As AT&T has explained,[33] the term "facility" in the FCC's rule does not necessarily refer to a literal piece of wire or a "tangible transmission media."[34] The FCC often treats discrete transmission *paths* as

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[30] *Id.* at 34-35.

[31] *Id.* at 35; *see also id.* at 63-64 (same).

[32] The CLECs dispute the frequency of this scenario. They state that "coaxial cable . . . is the cross-connect facility for the cross-connected carriers in dispute," *id.* at 48, and, as AT&T has explained (Initial Br. at 19), coaxial cable is typically used where a carrier splices into a third-party's transmission facility (rather than lighting a strand of fiber obtained from a third party). In fact, coaxial cable is not the cross-connect facility for *any* of the cross-connected carriers in dispute. *See* AT&T California Motion to Supplement the Record Attachs. B, C (Nov. 27, 2006) ("AT&T Mot. to Supplement"). Relatedly, with respect to the CLECs' claim (at 12-15) that AT&T introduced "extra-record testimony" in observing that a carrier that obtains a strand of dark fiber lights that fiber itself, the CLECs themselves have "describe[d] collocation configurations in which multiple carriers terminate strands from the same cable by adding their own electronics." *See* Chapman Rebuttal at 48 n.106 (quoting Order Approving Methodology to Determine AT&T Texas Wire Center which are Non-Impaired at 10, *Post-Interconnection Dispute Resolution Proceeding Regarding Wire Center UNE Declassification*, Docket No. 31303 (Tex. Pub. Util. Comm'n Apr. 6, 2006)).

[33] *See* AT&T Initial Br. at 28-29.

[34] CLEC Br. 64; *see* Chapman Rebuttal at 59-61.

"facilities," including in the loop and hybrid loop rules.[35] The same is true here. The "facility" at issue consists of all the electronics and equipment that establish the transmission path from the cross-connected carrier's collocation arrangement out of the central office. Under the terms of the FCC's rule, that "facility" is eligible to be considered a "comparable transmission facility," even though it includes capacity leased from another carrier.

The CLECs counter that the FCC defines a "loop" as "a transmission facility between a distribution frame (or its equivalent) in an incumbent LEC central office and the loop demarcation point at an end-user customer premises."[36] The CLECs then contend that "this definition actually demonstrates that regardless of what components are required to create a transmission path, that path ends when a facility terminates (at the distribution frame in the wire center for a local loop)."[37] But the question here is not where a "loop" begins and ends, but rather is whether the word "facility" in the FCC's fiber-based collocator definition should be read to include "capabilities" obtained from other carriers. As to that question, the FCC's rule states that the "local loop network element is defined as a transmission *facility*" that "includes *all* features, functions, and *capabilities* of such transmission facility, including the network interface device" and "all electronics, optronics, and intermediate devices (including repeaters and load coils) used to establish the *transmission path* to the end-user customer premises."[38] As this rule

[35] *See* AT&T Initial Br. at 21-22, 28-29; *cf.* 47 C.F.R. § 51.319(a) (defining "loop" to include transmission path); *id.* § 51.319(a)(2) (defining "Hybrid loop" to include multiple transmission media).

[36] 47 C.F.R. § 51.319(a).

[37] CLEC Br. at 62.

[38] 47 C.F.R. § 51.319(a) (emphases added).

makes clear, the FCC does not apply the word "facility" in the rigid manner that the CLECs suggest. Neither should this Commission.[39]

4. The CLECs also contend that cross-connected carriers do not meet three of the criteria for fiber-based collocators set out in Rule 51.5: that a carrier "operate" fiber or a comparable transmission facility; that such a facility "terminate" at the carrier's collocation arrangement; and that the carrier's facility "leaves" the wire center.[40] We address these criteria in turn.

i. As noted above, Rule 51.5 requires that a fiber-based collocator must "operate[]" fiber or a comparable transmission facility.[41] As AT&T's witnesses have testified, and as AT&T's initial brief discussed at length, even cross-connected collocators that splice into another carrier's transmission capacity "operate[]" a comparable transmission facility, in that they manage or control the operation of the transmission facility in a variety of ways (*e.g.*, establishing and controlling the characteristics of the transmission path, etc.).[42]

The CLECs claim that cross-connected carriers do not "'operate' a fiber cable" as required by Rule 51.5.[43] Their primary rationale, however, merely repeats the argument, addressed above, that a CLEC must *own and deploy* its own fiber to count under the FCC's rule. Thus, the CLECs contend that, in order to "operate" a fiber cable, a collocator would have to engage in activities "such as choosing the type and amount of fiber to deploy, attaching optronics and activating the transport fiber facility, engineering the capacity of circuits that facility, obtaining use of rights-of-

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[39] The CLECs' other argument that purports to address the "transmission path" theory, *see* CLEC Br. at 63 – *i.e.*, that Rule 51.5 requires that transport "terminate" at the collocation arrangement – is addressed *infra* at pp. 16-17.

[40] CLEC Br. at 29.

[41] 47 C.F.R. § 51.5.

[42] *See* Nevels Rebuttal at 8-9; Chapman Rebuttal at 48-50.

[43] CLEC Br. at 29.

way and or permits to construct in city streets, pulling fiber into the wire center."[44] Nearly all of these activities signify *ownership*, not operation. While ownership may have been relevant under the FCC's prior transport unbundling rules which have since been vacated,[45] for the reasons explained above, nothing in the FCC's current rules requires a carrier to own its own fiber to count as a fiber-based collocator.[46]

The CLECs are also incorrect to suggest that AT&T's position ignores the word "operate" in the FCC rule and "instead substitut[es] the term 'obtain.'"[47] In fact, AT&T has argued that the cross-connected carriers at issue satisfy any dictionary definition of the term "operate" – *i.e.*, to "run" or "control."[48] Indeed, it is the CLECs that attempt to change the FCC's rule by equating operation with *ownership*, as they do explicitly when they refer to "[a] collocator that has no fiber of its own (and therefore does not operate it)."[49]

Similarly, the CLECs contend that a carrier must own the optronics in order to truly "operate" the transmission facility.[50] As they see it, "the CLEC that owns the optronics to which the fiber terminates and that lights the fiber is the only entity that controls (i.e., operates) the

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[44] *Id.* at 33.

[45] *See*, *e.g.*, 47 C.F.R. § 51.319(e)(1)(ii)(A)(1) (2003) (establishing trigger for no-impairment finding for transport where, among other things, "[t]he competing provider has deployed *its own* transport facilities") (emphasis added), *vacated*, *USTA II*, 359 F.3d at 573-75.

[46] *See supra* pp. 5-8; *see also* Exh. 15 (Riordan Aff.) ¶¶ 6, 9 (noting that the Verizon CATT arrangement avoids the need for multiple carriers to engage in "construction in the streets," and that it is the wholesale provider that "pulls high-count fiber into the cable vault of the central office").

[47] CLEC Br. at 29; *see also id.* at 30 ("AT&T urges the Commission to substitute the word 'obtain' when applying the FCC's rules."); *id.* at 31 ("AT&T attempts to substitute a different, more lenient term – 'obtain.'").

[48] *See, e.g.*, AT&T Initial Br. at 19-21; Chapman Rebuttal at 48 (specifically denying that AT&T intends to substitute the word "obtain" for the word "operate").

[49] CLEC Br. at 28 (underlining in original).

[50] *Id.* at 34.

fiber cable."[51] Here again, this issue only arises where a cross-connected CLEC splices into an existing transmission facility, rather than lighting a fiber strand obtained from a wholesale provider. Even in that scenario, as Mr. Nevels has explained, "Collocator #2 controls the use of the facility with respect to the size of the signal it requires to meet the needs of its customers, whether or not the related optronics are part of its proprietary network. The effect is that the size of the signal is determined and created by equipment that is controlled and operated by Collocator #2."[52] The CLECs do not refute the point.

Moreover, the CLECs' focus on who owns the optronics would introduce needless complications into a process that the FCC intended to be "easily administrable."[53] The FCC made clear that the fiber-based collocation criteria are intended to turn on "readily identifiable" information precisely because ILECs can, among other methods, conduct "physical inspections of central office premises."[54] But "[w]hen AT&T California conducts a physical inspection of a central office for fiber-based collocators, it cannot tell – standing outside the collocation cage – whether a carrier has optronics in that cage or is connecting to optronics in another CLEC's cage."[55] To rely on ownership of optronics, as the CLECs now suggest, is contrary to the FCC's approach, which was intended to be based on "objective criteria to which the incumbent LECs have full access."[56]

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[51] *Id.* The CLECs make no effort to reconcile this argument with their position that, in the CATT fiber arrangement, the wholesale provider is the fiber-based collocator, even though it is the parties purchasing dark fiber from the wholesaler that terminate fiber strands using their own optronics.

[52] Nevels Rebuttal at 12.

[53] *TRRO* ¶ 99.

[54] *Id.* ¶ 100; *see also id.* ¶¶ 93 (noting that counting fiber-based collocators is the "best and most readily administered" test), 234 (the test is "based upon objective and readily obtainable facts").

[55] Nevels Rebuttal at 12.

[56] *TRRO* ¶ 108.

To support their claim that the rule requires ownership, the CLECs point again to the proposed AT&T-BellSouth merger commitment, claiming that "AT&T agreed that the term 'operate' requires a CLEC to 'own or manage the optronics on the fiber.'"[57] To the extent this proposed commitment is relevant at all, it supports AT&T's interpretation of the rule. For one thing, it is clear that the FCC did not construe the term "operate" to require ownership of the actual transmission *facility*; instead, all that might be required is that the collocator "own or manage the *optronics*." Moreover, the key word here is "*manage*," *i.e.*, all that the collocator need do is "manage" the optronics, which is what occurs in the scenario at issue here.[58]

Next, the CLECs argue that "[t]he FCC's reasoning elsewhere in the *TRRO* also demonstrates that purchasing a service on an already lit fiber cable does not constitute operation of fiber facilities."[59] The CLECs then refer to the *TRRO* passage stating that the fiber-based collocator count should include situations "'when a company has collocation facilities connected to fiber transmission facilities obtained on an indefeasible right of use (IRU) basis from another carrier, including the incumbent LEC.'"[60] But as AT&T already explained[61] – in a passage that the CLECs ignore – the actual rule adopted in the *TRRO* does not require an indefeasible right of

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[57] CLEC Br. at 32 (quoting AT&T BellSouth Merger Commitment Letter).

[58] *Cf.* Nevels Rebuttal at 9 (a cross-connected carrier fits within a definition of "operate" that includes the synonym "manage").

The CLECs also suggest that the definition of "operate" should be construed in light of the FCC's discussion of dark fiber, in which the FCC supposedly "distinguished the situation in which a CLEC would 'operate' dark fiber from the situation of using lit transport on the basis that the CLEC 'engineers and controls the network capabilities of transmission and can maximize the use of previously dormant fiber.'" CLEC Br. at 32 (quoting *TRRO* ¶ 135). What the FCC really said, however, was that "competing carriers using unbundled dark fiber transport can operate more efficiently than when using lit transport, because the competing carrier itself engineers and controls the network capabilities of transmission and can maximize the use of previously dormant fiber." *TRRO* ¶ 135. This statement has nothing to do with defining or distinguishing what it means for a carrier to "operate" the transport in question.

[59] CLEC Br. at 35.

[60] Starkey Direct at 28 (quoting *TRRO* ¶ 102 n.292).

[61] *See* AT&T Initial Br. at 23-25.

use in all scenarios. The rule requires only that the collocator "operate[] a fiber-optic cable or comparable transmission facility . . . owned by a party other than the incumbent LEC or any affiliate of the incumbent LEC," while "*[d]ark fiber obtained from an incumbent LEC* on an indefeasible right of use basis shall be treated as non-incumbent LEC fiber-optic cable."[62] Thus, an "indefeasible right of use" is relevant only when (1) the fiber is dark, rather than lit, and (2) the dark fiber at issue is "*obtained from an incumbent LEC*." Where a carrier obtains access to a lit fiber owned by another CLEC, the rule does not ask whether an IRU exists. Moreover, the FCC could not have meant to look for IRUs where one CLEC obtains dark fiber or transmission capacity from another, given the FCC's aim of avoiding reliance on information that is "possessed entirely by a span of competitive LECs and [is] not easily verifiable."[63]

Finally, the CLECs contend that counting cross-connected collocators is "directly inconsistent" with the FCC's decision to exclude collocations that are owned by the "same or affiliated carriers."[64] As AT&T has explained,[65] the CLECs' argument proves only that when the FCC wanted to create an exception (*i.e.*, for affiliated collocators), it did so in clear language. Moreover, these two situations are not analogous; affiliated collocators do not reflect multiple genuine competitive alternatives, whereas *un*affiliated collocators do present competitive alternatives, even where one of them relies to some degree on transmission (or dark fiber) obtained from the other.[66]

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[62] 47 C.F.R. § 51.5 (emphasis added).

[63] *TRRO* ¶ 99.

[64] CLEC Br. at 36-37 (citing *TRRO* ¶ 102).

[65] *See* AT&T Initial Br. at 24 n.92.

[66] *See* Chapman Rebuttal at 12. The CLECs relatedly claim that "AT&T's approach further contradicts the FCC's admonition that simply counting the number of collocation arrangements in a wire center is insufficient to approximate the existence of competitive facilities." CLEC Br. at 37. But the FCC made no such "admonition" or finding. Instead, the footnote cited here (*TRRO* ¶ 102 n.296) is

ii. Rule 51.5 states that the fiber or comparable transmission facility operated by the collocator must "[t]erminate[] at a collocation arrangement within the wire center."[67] The CLECs claim that cross-connected carriers do not satisfy this portion of Rule 51.5, because fiber can "terminate only once in a wire center because the strand can, by definition, terminate to only one set of optronics."[68] Of course, where a carrier obtains dark fiber and lights that fiber itself – as, for example, in a CATT arrangement or one comparable to it – that carrier satisfies this requirement even under the CLECs' test.

Beyond that, as AT&T has explained,[69] even where a CLEC cross-connects into an existing transmission path, the "terminate" requirement in Rule 51.5 is satisfied by virtue of the fact that the cross-connect, which comprises part of a "comparable transmission facility," terminates at the collocation arrangement.[70] The CLECs do not dispute this point, instead pointing to their argument that a transmission facility that includes a cross-connect should not count as a "facility."[71] But that is another issue. Regardless of whether a CLEC that uses a cross connect to connect to another CLEC can be said to operate a "comparable transmission facility," it is indisputable that the cross-connect itself (and therefore what AT&T characterizes as the "comparable transmission facility") "terminates" in the cross-connected carrier's collocation arrangement. The "terminate" portion of Rule 51.5 is therefore not properly at issue here.

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attached to the textual point that affiliated collocators should be counted only once. *See TRRO* ¶ 102. The footnote then merely points to comments suggesting that it would be better to count the number of fiber-based collocators than the number of cages (some of which might have been established by the same or affiliated collocators). That footnote in no way suggests that it is inappropriate to count independent fiber-based collocators who happen to operate fiber transmission facilities leased from another CLEC.

[67] 47 C.F.R. § 51.5.

[68] CLEC Br. at 37-38; *see also* CLEC Br. at 63 (same point).

[69] *See* AT&T Initial Br. at 21-23.

[70] *See* Chapman Rebuttal at 50-51.

[71] CLEC Br. at 38.

iii. Rule 51.5 requires that the collocator operate a fiber or comparable transmission facility that "[l]eaves the incumbent LEC wire center premises."[72] The CLECs claim that cross-connected carriers fail this third aspect of the rule because they "do not have a fiber cable that exits the wire center."[73] The CLECs' support this argument with a reference to Mr. Nevels' statement that a cross-connected carrier "does not own the fiber it uses to leave the wire center, but instead obtains that transmission capability from another carrier."[74] But AT&T has never contended otherwise; the whole point is that the rule does not require literal ownership of every part of the comparable transmission facility. Instead, the rule is satisfied by the fact that, because the cross-connect and the transmission capacity obtained from a third party function as a unified network, the cross-connected carrier necessarily operates a facility that leaves the wire center. As Ms. Chapman explains, "AT&T California did not count interoffice cabling except as part of a larger transmission facility that left the wire center,"[75] and "a carrier with a collo-to-collo connection to another carrier will *not* be considered to be a Fiber-based Collocator *unless* that collo-to-collo connection provides the carrier with the ability to either directly access a fiber entrance facility that leaves the wire center or create a network that is comparable to fiber that leaves the wire center."[76] If the Commission agrees that cross-connects form part of a single network that is properly considered a "comparable transmission facility," the "leaves the wire center" prong of Rule 51.5 is necessarily satisfied.[77]

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[72] 47 C.F.R. § 51.5.

[73] CLEC Br. at 39; *see also id.* at 57 (same argument).

[74] Nevels Direct at 9.

[75] Chapman Rebuttal at 58.

[76] *Id.* at 51.

[77] The CLECs respond to AT&T California's reliance on the Ohio commission's ruling on this issue by pointing to decisions of commissions or arbitrators in other states. *See* CLEC Br. at 39-45. Those decisions, however, do not distinguish the Verizon CATT arrangement from the functionally

B. What constitutes a "comparable transmission facility" under the FCC's definition of a "Fiber-based collocator"?

The FCC's definition of "fiber-based collocator" is "technologically neutral" and "agnostic as to the medium used to deploy an alternative transmission facility,"[78] and it therefore counts not just fiber, but any "comparable transmission facility."[79] As AT&T has explained, the FCC provided guidance as to what constitutes a "comparable transmission facility" by identifying "fixed wireless" arrangements,[80] which typically have transmission capabilities at a DS3 level or above.[81] In light of the FCC's determination to count such arrangements as comparable to fiber, AT&T California decided to count only those cross–connected carriers whose networks likewise support a minimum of DS3 level transport.[82]

The CLECs' discussion of this issue is devoted to identifying and refuting a series of strawmen. For example, the CLECs point out that there are no fixed wireless carriers that are subject to this proceeding (which is beside the point),[83] and that carriers that connect to a fixed

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identical cross-connections at issue here; indeed, most do not mention the CATT arrangement at all. *See* Attachment 4 to CLEC Brief, at ¶ 29 (Kansas); Attachment 6 to CLEC Brief at 13-14 (Texas); Attachment 8 to CLEC Brief at 32-43 (Oklahoma); Attachment 9 to CLEC Brief at 17 (Illinois); Attachment 10 to CLEC Brief at *63-*64 (New Hampshire); Order, *In the matter, on the Commission's own motion, to commence a collaborative proceeding to monitor and facilitate implementation of Accessible Letters issued by SBC MICHIGAN and VERIZON*, Case No. U-14447, 2005 Mich. PSC LEXIS 310 (Mich. PSC Sept. 20, 2005); Order Addressing Changes of Law, *Petition of BellSouth Telecommunications Inc. to Establish Generic Docket to Consider Amendments to Interconnection Agreements Resulting from Changes of Law*, Docket No. 2004-316-C, Order No. 2006-136, at 38-39 (S.C. PSC Mar. 10, 2006), available at http://dms.psc.sc.gov/attachments/Orders/E54C9AD9-DC97-8E58-72F670A07AC0C576.pdf. (The CLECs included the wrong Michigan and South Carolina orders as Attachments 5 and 7 to their brief; those decisions are available as cited above.)

[78] *TRRO* ¶ 102 n.295.

[79] 47 C.F.R. § 51.5.

[80] *TRRO* ¶ 102.

[81] *See* Nevels Direct at 6-7.

[82] *See* Chapman Direct at 30-31; Nevels Direct at 6-8, 13.

[83] *See, e.g.*, CLEC Br. at 48.

wireless arrangement are not themselves independent fiber-based collocators (which is also beside the point and has not been argued by any party).[84]

The CLECs also contend that *coaxial cable* "is the cross-connect facility for the cross-connected carriers in dispute,"[85] and they insist that a coaxial cross-connect is, as a technical matter, not comparable to a fiber transmission facility.[86] In truth, as noted above, *see supra* p. 9 & n.32, *none* of the cross-connected carriers on which AT&T California relies used coaxial cross-connects. In any event, as AT&T has explained, [87] the fact that a coaxial cross-connect is not physically comparable to a fiber transport facility is beside the point. A cross-connect is not a separate "comparable transmission facility" by itself. Instead, "the collo-to-collo connection is a just a small segment of an uninterrupted transmission route that leaves the wire center."[88] As the Ohio commission held, "in evaluating the 'comparable transmission facility' to the fiber cable in dispute, we evaluate the facility as a whole, and not the coaxial cable section that cross-connects the equipment of one collocator to the fiber facility of the other FBC."[89]

The CLECs also contend that the "economics" of deploying a DS3 cross-connect to connect to a third party are "not comparable to a fiber-optic transmission facility."[90] But, quite

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[84] *See id.* at 52; *see also id.* at 49-50 (arguing that a fixed wireless arrangement is "not equivalent" to a cross-connect).

[85] *See id.* at 48; *see also id.* at 58 ("[T]he type of cable typically used for intraoffice cross connects is coaxial cable.").

[86] *See id.* at 58.

[87] *See* AT&T Initial Br. at 27-28.

[88] Nevels Rebuttal at 13; *see also* Chapman Rebuttal at 60-61.

[89] Finding and Order at 8, *Petition of XO Communications, Inc. Requesting a Commission Investigation of Those Wire Centers that AT&T Ohio Asserts are Nonimpaired*, Case No. 05-1393-TP-UNC (Ohio Pub. Utils. Comm'n June 6, 2006).

[90] CLEC Br. at 59.

apart from the fact that the CLECs' cost estimates are inflated,[91] nothing in the FCC's rule requires that a carrier spend a certain amount of money to count as a fiber-based collocator. On the contrary, as explained above, the FCC made clear that its rules presume "that competitive LECs will use reasonably efficient technologies and take advantage of existing alternative facilities deployment where possible."[92] Beyond that, a carrier that connects to a dark fiber wholesaler via a Verizon CATT arrangement likewise does not invest the same amount of capital as does a carrier that deploys its own fiber, but, as we have seen, the FCC made clear that such a carrier counts for purposes of its rule.[93]

[91] *See* AT&T Initial Br. at 30; Chapman Rebuttal at 10-11.

[92] *TRRO* ¶ 28.

[93] The CLECs object (at 61) that there is "no citation to the record for th[e] proposition" that a carrier that relies on a CATT fiber arrangement does not incur the costs of deploying fiber. In fact, exhibit 15 (the Riordan affidavit) explains that in the Verizon CATT arrangement, it is the wholesale provider that provides the "dark fiber backbone network" that is then "distributed" to other collocated CLECs. Exh. 15 (Riordan Aff.) ¶ 6.

The CLECs also claim that "[t]he fact that recognized comparable transmission facilities may not incur some of the same costs as a carrier deploying fiber is irrelevant to whether it would be economic for a carrier to incur the substantial fixed and sunk costs of deploying fiber facilities limited to DS3 capacity." CLEC Br. at 61. Whether carriers would spend substantial sums to deploy fiber limited to DS3 capacity is not the question. The question is whether DS3 capacity should be treated as "comparable" to fiber given the FCC's approval of the fixed wireless arrangement, which the CLECs do not dispute can provide a DS3 capacity.

C. What data should be used to identify FBCs in the disputed wire centers?

i. Should affiliate relationships (other than the affiliation between AT&T Corp. and SBC Communications Inc.) be examined based on the carrier's affiliate status at the time that the wire center is designated as non-impaired or should more recent data be considered? Should the affiliate relationship between Verizon and MCI affect the FBC count (regardless of the date of affiliation)?

The issue here is whether AT&T should be forced to revise its March 11, 2005 designations to exclude collocation arrangements that were affected by post-March 11, 2005 mergers (including the Verizon-MCI merger). AT&T has explained in detail that it would be improper to rely on events that took place after the date of AT&T's wire center designations.[94] The CLECs do not make any argument that AT&T did not address in its opening brief,[95] and AT&T therefore stands on its initial brief as to this issue.

ii. How should fiber that AT&T Corp. deployed prior to the merger with SBC Communications Inc., and that is operated and/or utilized by other carriers, be treated?

Here too the CLECs do not identify any argument that AT&T has not already addressed.[96] AT&T accordingly stands on its initial brief as to this issue as well.[97]

iii. Are network changes that occurred after March 11, 2005, relevant to the disputed wire center determinations?

As AT&T has explained in detail, the question at issue in this proceeding is whether AT&T's wire center designations were accurate when made. It follows that the relevant facts are those that existed at the time of those designations. Most of the arguments related to this "data

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[94] *See* AT&T Initial Br. at 31-34; *see also id.* at 45-49 (explaining, in the context of the dispute over the vintage of business line data, that the relevant inquiry here is the facts as they existed on the date of AT&T's wire center designations).

[95] *See* CLEC Br. at 65-67.

[96] *See id.* at 67-68.

[97] *See* AT&T Initial Br. at 34-35.

vintage" issue are addressed in AT&T's initial brief[98] and below,[99] and AT&T will not belabor those points here.

The CLECs make a few additional arguments here that deserve refutation, however. *First*, the CLECs note that the *TRRO* mentions the "evidence of actual deployment found in the record,"[100] and they contend that this reference to "actual deployment" means that the FCC intended for the most current data to be used to gauge impairment.[101] But the FCC's point here had nothing to do with the data vintage issue. The language on which the CLECs rely reads, in its entirety: "We believe it is reasonable to expect that competitive LECs can most economically deploy dedicated transport facilities and high-capacity loops in those geographic markets where revenue opportunities are highest, which is confirmed by the evidence of actual deployment found in the record."[102] In other words, the FCC was merely pointing out that evidence of "actual deployment" confirmed the common-sense expectation that CLECs are, as a general matter, better able to deploy facilities in areas where revenue opportunities are high. This observation has no bearing on whether wire center designations should be judged based on subsequent data rather than on the data available at the time of designation.

Second, the CLECs point out that, in the *TRO*, the FCC stated that "[e]ach counted self-provisioned facility along a route must be operationally ready to provide transport into or out of an incumbent LEC central office."[103] According to the CLECs, this means that the most current data should be used, or else the Commission might count arrangements that are no longer

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[98] *See id.* at 31-32, 44-52.

[99] *See infra* at 27-31.

[100] *TRRO* ¶ 43.

[101] *See* CLEC Br. at 69.

[102] *TRRO* ¶ 43.

[103] *TRO* ¶ 406.

"operationally ready" to provide service.[104] As applied to the question whether AT&T's designations were correct as of March 11, 2005, the *TRO*'s statement here would merely suggest that the Commission should determine whether fiber-based collocation arrangements were "operationally ready" as of March 11, 2005, which is exactly what AT&T did in its wire center inspections. In any event, that portion of the *TRO* was vacated by *USTA II*, and stray statements from the *TRO* cannot be used to dictate the terms of the counting process under the current federal rules.

Third, the CLECs point to conditions the FCC imposed on its approval of the AT&T-SBC and Verizon-MCI mergers, which precluded those companies from counting collocation arrangements established by the partner to the merger.[105] According to the CLECs, this proves that the FCC requires "wire center impairment analyses to be based on current, accurate data."[106] To the contrary, as AT&T has explained, the very fact that the FCC included these merger conditions proves, if anything, that the federal rules do *not* otherwise contain such a requirement.

Fourth, the CLECs point out that the *TRRO* intended to rely on data that was "readily available" and "easily verifiable,"[107] but that it is "quite literally impossible for the Commission or the Joint CLEC defendants to verify AT&T's data."[108] The argument proves too much: Any difficulty in proving wire center conditions at a previous time affects AT&T as well, which is why the Commission held in the *TRO/TRRO* proceeding that CLECs should be required to self-certify within three years and that later certifications would create "inordinate problems of

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[104] CLEC Br. at 69-70, 71.

[105] *See id.* at 70.

[106] *Id.*

[107] *TRRO* ¶¶ 99, 100.

[108] CLEC Br. at 70-71.

proof."[109] That holding makes no sense unless the Commission assumed that wire center designations would be judged based on the data available at the time of designation.

Fifth, the CLECs claim that AT&T's discovery responses (in particular, an email of August 3, 2005, shown in Exhibit 57-C) show that, as of August 2005, AT&T made a few changes to its list of fiber-based collocators based on wire-center inspections conducted after March 11, 2005.[110] But the CLECs did not need discovery to learn this; it is explained in Marvin Nevels' Direct Testimony, filed with AT&T California's amended complaint.[111] Moreover, as Ms. Chapman explains, AT&T California did not rely on *any* of the fiber-based collocators identified in those inspections unless it "was able to affirmatively verify that the collocation arrangement qualified as a Fiber-based Collocator as of March 11, 2005."[112]

Finally, the CLECs address several alleged errors regarding the designation of certain entities, including FirstWorld Communications, Inc., Fiber Communications, Integrated Communications Consultants, Radio Communications Services, Air Communications Co., ICG, and Verizon.[113] AT&T has already addressed the bulk of these alleged errors, which for the most part have no bearing on whether any wire center is designated as non-impaired.[114] Because the CLECs' discussion of these entities repeats what is included in their testimony, and because

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[109] Decision Adopting Amendment to Existing Interconnection Agreements at 13, *Application of Pacific Bell Telephone Co. d/b/a SBC California for Generic Proceeding to Implement Changes in Federal Unbundling Rules Under Sections 251 and 252 of the Telecommunications Act of 1996*, Decision 06-01-043, A.04-03-014, at 58 (Jan. 26, 2006) ("Decision 06-01-043").

[110] *See* CLEC Br. at 82.

[111] *See* Nevels Direct at 15.

[112] Chapman Rebuttal at 69-70.

[113] *See* CLEC Br. at 72-80.

[114] *See* AT&T Initial Br. at 35-37 (discussing Verizon and ICG), 40-44 (discussing Air Communications, Fiber Communications, Firstworld Communications, Inc., Integrated Communications Consultants, and Radio Communications Services).

AT&T addressed that testimony in its own rebuttal testimony and its opening brief, we will not, aside from two exceptions set out in the footnote below, address them further here.[115]

iv. Is a carrier that sub-leases collocation space from another carrier eligible to be considered as an FBC?

The CLECs' only argument as to this issue is that, if AT&T counts a fiber-based collocator that subleases collocation space from another collocator, this amounts to double-counting.[116] That is not so. As AT&T has pointed out, the FCC held that collocation arrangements "may be obtained by the competing carrier either pursuant to contract, tariff or, where appropriate, section 251(c)(6) of the Act, including less traditional collocation

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[115] In its opening brief, AT&T incorrectly stated that the identification of ICG as a fiber-based collocator in one wire center would impact the designation of that wire center. *See* AT&T Initial Br. at 36-37. In fact, that wire center is designated as a Tier 1 wire center based on the number of business lines, not fiber-based collocators. *See* Chapman Direct Attach. CAC-2, at 2. In any event, the CLECs' challenge to this identification is misplaced. The CLECs insist that AT&T "[]identified Mpower Communications" as a fiber-based collocator in the wire center at issue, and they further note that AT&T California provided photographs to the Joint CLECs showing "[t]his empty collocation cage." CLEC Br. 78. But the purpose of those photographs – which AT&T California provided to the Joint CLECs in an attempt to resolve this issue, but which are not part of the record here – was to show the CLECs that Mpower's empty collocation cage was *not* the one on which AT&T California relied. In any event, the photos are beside the point. As the record makes clear, AT&T California relied on *ICG's* collocation arrangement in the wire center at issue, not Mpower's. *See* Chapman Supplemental Rebuttal at 8-9. And nothing in the record suggests that *ICG* was not a fiber-based collocator in the wire center at issue at the time AT&T California made its designations.

The CLECs express concern that AT&T California noted in its opening brief that it had provided evidence to the CLECs on this issue that is not in the record. AT&T California made that point solely to advise the ALJ that this issue might be resolved and that he therefore should not expend time and resources addressing the issue until it was clear whether it could be resolved. AT&T did not, and does not, seek to introduce the photos it shared with the CLECs into the record. Furthermore, AT&T California has no objection to the CLECs' request (at 11) to strike footnote 140 from AT&T California's opening brief, as footnote 140 merely noted AT&T California's expectation that the issue might be resolved between the parties. As a result, the Joint CLECs' contingent motion (CLEC Br. at 79) to introduce testimony addressing those photographs – which in any event is procedurally improper, *see* CPUC Rule 1.7 – is moot.

Finally, the CLECs state that there are no records demonstrating an "active power supply" for a few select collocators in a few select wire centers. CLEC Br. at 24-25 n.76. In fact, AT&T produced billing records to the CLECs confirming, as AT&T California represented in its opening testimony, that each collocation arrangement identified by the CLECs had an active power supply as of the date of the wire center designations. *See* AT&T Mot. to Supplement & Conf. Attach. A.

[116] *See* CLEC Br. at 83-84.

arrangements such as Verizon's CATT fiber termination arrangements."[117] A sublease would fall directly under the paragraph 102 language, whether as a matter of "contract" or as a "less traditional" arrangement. In short, as long as a collocation arrangement exists, the carrier is eligible to be considered a fiber-based collocator; the manner in which the carrier obtained its collocation arrangement is irrelevant.

D. Taking all relevant factors into consideration, are the FBCs identified by AT&T California appropriate? If not, what adjustments to the FBC count should be made?

For the reasons explained above, the fiber-based collocator counts incorporated into AT&T California's wire center designations are consistent with the *TRRO* and the FCC's rules, and they should be adopted by the Commission.[118]

II. *Business Line Counts:* How should Business Lines be counted in order to comply with the FCC's definition of "Business Lines" in 47 C.F.R. § 51.5 and applicable orders?

A. What is the appropriate vintage for the supporting data used in evaluating the Business Line counts governing proper classification in the disputed wire centers?

With respect to the vintage of data used to count business lines, the CLECs' entire presentation is framed by a single, inaccurate statement: that "AT&T bases its position solely on

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[117] *TRRO* ¶ 102.

[118] The CLECs claim that AT&T California made numerous errors in its wire-center inspections, and they seem to suggest that, as a result of these alleged errors, AT&T California should be held not to have satisfied its burden of proof (which they alternately describe as "clear [and] convincing" and "preponderance of the evidence"). CLEC Br. at 2, 4. But, as AT&T has explained, *see supra* pp. 24-25, none of the handful of errors the CLECs have alleged would affect AT&T California's wire center designations. And, to the extent the CLECs mean to suggest that the Commission should conclude that there are *no* fiber-based collocators in *any* wire centers in California, that contention is insupportable. As AT&T California explained in its initial brief (at 5-6), and as the CLECs do not contest, despite the CLECs' five-month investigation, the vast majority of fiber-based collocation arrangements AT&T California identified are unchallenged here. That fact alone dispels any suggestion that the isolated allegations of errors on which the CLECs rely somehow undermine the validity of AT&T California's entire inspection process.

the fact that the *TRRO* took effect on March 11, 2005."[119] AT&T has never taken that position. Instead, as AT&T California explained at length in its initial brief, there are at least four reasons – none of which rely solely on the *TRRO*'s effective date – why the Commission should use the data available as of March 11, 2005 in this case.[120]

First, and most importantly, AT&T's complaint asks the Commission to determine the accuracy of the wire center designations AT&T California made as of March 11, 2005, which is also the date as of which the CLECs self-certified that they were entitled to continue ordering UNEs in the wire centers at issue.[121] Under the interconnection agreement language between the parties, moreover, the CLECs must pay a true-up back to the date of designation (March 11, 2005) to the extent that AT&T's designations were accurate.[122] In this context, it would make no sense for the wire center designations to be deemed inaccurate (or accurate, for that matter) based on post-March 11, 2005 data.

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[119] CLEC Br. at 68; *id.* at 91 (claiming that AT&T has argued for the use of 2003 data because "it is the data that the FCC used" and "the effective date of the *TRRO* should govern"); *id.* at 7 ("AT&T's only justification for using historical data is that those were the data available at the time the FCC was deliberating the TRRO or at the time the TRRO took effect.").

[120] *See* AT&T Initial Br. at 44-52.

[121] *See* Exhs. 12C-14C.

[122] *See* TRO/TRRO Attachment to Amendment ¶¶ 4.1.3, 4.1.3.1. Section 4.1.3.1 states, in relevant part:

> For the affected loop/transport element(s) installed prior to March 11, 2005, if the Relevant Transition Period is within the initial TRRO transition period described in Section 3.2.1 of this Attachment, CLEC will provide true-up based on the FCC transitional rate i.e., the rate that is the higher of (A) the rate CLEC paid for the Affected Element(s) as of June 15, 2004 plus 15% or (B) the rate the state commission established if any, between June 16, 2004 and March 11, 2005 for the Affected Element(s), plus 15%. *The true-up will be calculated using a beginning date that is equal to the latter of March 11, 2005, or, for wire centers designated by AT&T after March 11, 2005, thirty days after AT&T's notice of non-impairment.* (Emphasis added.)

For circuits ordered after March 11, 2005, "CLEC will provide true-up to an equivalent special access rate as of the latter of the date billing began for the provisioned element or thirty days after AT&T ILEC's notice of non-impairment." *Id.*

The CLECs have no answer to this point. Instead, they assert – without citation, support, or elaboration – that any true-up would date only to "March 2006, when AT&T filed the amended complaint."[123] That is wrong. The Commission-approved contract language requires a true-up back to March 11, 2005.[124] It follows that the question presented here is whether the wire centers were correctly designated as non-impaired as of that date. And that question, in turn, can only be answered by looking at the data available as of that date.

Second, the *TRRO* itself was based on the 2003 ARMIS 43-08 data available at the time the *TRRO* took effect.[125] But, contrary to the CLECs' inaccurate suggestion,[126] that does not mean that AT&T California's position is that all wire center designations are necessarily tied to 2003 data. To the contrary, the *TRRO*'s effective date is relevant here because AT&T's wire center designations were effective *as of the same date*. If the FCC thought it legitimate to rely on 2003 ARMIS 43-08 data when issuing an order effective on March 11, 2005, it was also legitimate for AT&T to look at the same data when making wire center designations effective that same date.[127] In response, the CLECs claim that the FCC "placed no particular significance on the 2003 ARMIS data," but that was "simply what was available at the time."[128] That is precisely the point: the 2003 ARMIS 43-08 data was likewise "what was available at the time" that

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[123] CLEC Br. at 10.

[124] *See* AT&T Initial Br. at 45-46.

[125] *See id.* at 47-48; *see also TRRO* ¶ 70 n.204.

[126] *See* CLEC Br. at 90 (suggesting that AT&T might try to use 2003 data in some future case).

[127] It is inaccurate to state that the FCC used 2003 data for a "different purpose" (*i.e.*, setting "general thresholds") than the Commission faces here (*i.e.*, determining the status of particular wire centers). *See id.* at 91. A wire center that was non-impaired as of March 11, 2005 under those "general thresholds" remains unimpaired today. If it was appropriate to use 2003 data to establish those general thresholds in the first place, it was appropriate to use the same data to determine whether a wire center met those thresholds as of the date they took effect.

[128] *Id.* at 90.

AT&T made its wire center designations, and AT&T California's reliance on that data was wholly appropriate.[129]

Third, the FCC emphasized that "once a wire center satisfies the standard for" non-impairment for a particular type of facility, "the incumbent LEC shall not be required in the future to unbundle" that facility, irrespective of any changes to the number of fiber-based collocators or business lines that may occur in the future.[130] This Commission has recognized the same principle, holding that, "once a wire center satisfies the no-impairment criteria, it cannot move back to impaired status," and, "[s]ince that is the case, *there is no reason for CLECs to obtain data for those wire centers which have satisfied the no-impairment criteria.*"[131] As AT&T has pointed out, if CLECs are not allowed to *obtain* subsequent data, it would make no sense to hold that the outcome of a wire center dispute hinges on such data.

For their part, the CLECs cite the irreversibility of wire center designations as if this *required* the use of subsequent data.[132] The CLECs' argument makes no sense – the point of the FCC's holding was to prevent the use of subsequent data to overturn wire center designations that were correct at the time. For the same reason, the CLECs are off the mark in pointing to the "trend in the years since AT&T's 2003 ARMIS data was produced,"[133] *i.e.*, the fraction of a

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[129] The CLECs repeat their inaccurate claim that paragraph 105 of the *TRRO* cited a report that contained "**2004** ARMIS data." *Id.* at 90 (emphasis in original). As AT&T already explained, *see* AT&T Initial Br. at 46 n.177, that 2004 report contained only *instructions* for compiling ARMIS data, not any actual ARMIS data.

[130] *TRRO* ¶ 167 n.466; *see also* 47 C.F.R. § 51.319(a)(4), (a)(5), (e)(3).

[131] Decision Adopting Amendment to Interconnection Agreements, *Petition of Verizon California Inc. (U 1002 C) for Arbitration of an Amendment to Interconnection Agreements with Competitive Local Exchange Carriers and Commercial Mobile Radio Service Providers in California Pursuant to Section 252 of the Communications Act of 1934, as Amended, and the Triennial Review Order*, Decision 06-02-035, A.04-03-014, at 47 (Feb. 16, 2006) (citing *TRRO* ¶ 167 n.466) (emphasis added).

[132] *See* CLEC Br. at 90.

[133] *Id.* at 88-90.

percentage point drop in the business line count between 2003 and 2005.[134] As the FCC itself explained, its rule was meant to *prevent* wire center designations from being reversed due to such "modest changes" in a "dynamic market."[135]

Fourth, as noted above, the Commission's decision in the *TRO/TRRO* proceeding effectively held that any wire center impairment designations would be judged by the data available at the time. AT&T California argued that CLECs should have a time limit for self-certification, because if they self-certified too long after the fact, it would be difficult to prove the characteristics of the wire center at the time of designation.[136] The Commission "concur[red] . . . that it is unworkable to have no firm, fixed deadline after which no CLEC would be permitted to self-certify," and thus held that "three years will ensure that CLECs do not seek to self-certify *many years after the fact, thus creating inordinate problems of proof*."[137] This holding is impossible to square with the CLECs' proposal to use the most recent data available today; no "inordinate problems of proof" would ever arise if the Commission intended to use the most current data available to determine the validity of wire center designations.

The CLECs also claim that "more recent business line data is a better match for the fiber-based collocator counts submitted by AT&T."[138] But, as AT&T has pointed out,[139] the Commission already implicitly recognized data mismatches would occur, in that AT&T California is allowed to update its wire center lists once in any given three-month period,[140]

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[134] *See id.* at 89; *cf. id.* at 68 (alleging that the number of fiber-based collocators has decreased since 2005).

[135] *TRRO* ¶ 167 n.466.

[136] *See* Decision 06-01-043, at 57-58.

[137] *Id.* at 58 (emphasis added).

[138] CLEC Br. at 87.

[139] *See* AT&T Initial Br. at 49-51.

[140] *See* Decision 06-01-043, at 55.

while ARMIS 43-08 data are available only once per year.[141] Moreover, as Ms. Chapman explains, it is common practice for AT&T California to rely on the ARMIS 43-08 data to determine whether additional physical inspections of wire centers are warranted (to determine the number of fiber-based collocators). In that context, it is simply impossible to conduct the physical inspections on the same date that the business line counts were conducted.[142] The CLECs do not address any of these points.[143]

B. How should UNE Loops be counted?

i How should digital UNE-L lines be counted under the FCC's definition of business line?

The issues regarding the counting of UNE loops are resolved by the plain text of the FCC's rules and Commission precedent.

As the Commission held in Decision 06-01-043, Rule 51.5 instructs that the business line count should include "the sum of *all UNE loops* connected to that wire center, including UNE loops provisioned in combination with other unbundled elements."[144] Similarly, the text of the *TRRO* states that the FCC relied on data that included "ARMIS 43-08 business lines, plus business UNE-P, plus UNE-loops."[145] As the Commission held, "[s]ince the FCC uses the phrase 'UNE loops' in both the discussion and in its rule, we must assume that that is exactly what the FCC meant;" "the FCC's language is clear that all UNE loops are to be included in the

[141] *See* Chapman Rebuttal at 38-39.

[142] *See id.* at 39.

[143] The CLECs' preference for data matching is also belied by their continued preference for year-end 2005 data, which is further removed from the data of the wire center inspections than year-end 2004 data. *See* CLEC Br. at 87-92; AT&T Initial Br. at 45-46.

[144] Decision 06-01-043, at 11 (internal quotation marks omitted; emphasis added).

[145] *TRRO* ¶ 105 (footnote omitted).

count."[146] To the extent the CLECs argue that a UNE loop counts only if it is used "to serve a business customer,"[147] they are incorrect.

The digital equivalency issue is likewise settled by the text of the federal rule, which states that the business line count "shall account for ISDN and other digital access lines by counting *each 64 kbps-equivalent* as one line."[148] The rule then provides a specific example: "a DS1 line corresponds to 24 64 kbps-equivalents, and therefore to 24 'business lines.'"[149] As the Texas federal district court recently held in resolving this exact issue, the rule could not be clearer: DS1 UNE loops are counted as 24 business lines.[150]

The CLECs' arguments to the contrary are unconvincing. *First*, the CLECs contend that the business line definition should be "read in its entirety,"[151] and that in light of the rest of Rule 51.5, any "business line" must be one that is "used to serve a business customer."[152] But this Commission already rejected that position, based on the clear language of the FCC's rule, which requires the inclusion of "the sum of all incumbent LEC business switched access lines, plus the sum of all UNE loops connected to that wire center."[153] As the Texas federal district court explained, the "FCC explicitly intended to count all UNE loops, not just those 'provisioned in combination with' business lines."[154]

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[146] Decision 06-01-043, at 10-11.

[147] CLEC Br. at 98.

[148] 47 C.F.R. § 51.5 (emphasis added).

[149] *Id.*

[150] *See* Texas Decision at 6-7.

[151] CLEC Br. at 97.

[152] *Id.* at 98.

[153] 47 C.F.R. § 51.5.

[154] Texas Decision at 4.

Moreover, the court noted that the FCC specifically rejected "loop-by-loop evaluations" in paragraph 159 of the *TRRO*, on the grounds that such information is "'not easily verifiable, and is often exclusively within the possession of competitive LECs, many of which have little incentive to provide that information to regulators evaluating impairment.'"[155] Similarly, this Commission has already acknowledged that AT&T California "do[es] not have the information necessary to distinguish UNE loops used by CLECs to serve residential customers versus business customers."[156] The same is true with respect to the information necessary to determine precisely how CLECs are using digital loops. Because AT&T California does not have this information, it follows that it is not meant to be considered in calculating the number of business lines in a given wire center. The CLECs present no response to this point.

Second, as to the issue of digital capacity, the CLECs contend that Rule 51.5 "merely directs that each 64 kbps-equivalent should be considered 'one line;' it does not direct that each line then be declared a 'business line' without regard to the remaining criteria."[157] This analysis ignores the final sentence of Rule 51.5, which specifies that "a DS1 line corresponds to 24 64 kbps-equivalents, and therefore to 24 '*business lines.*'"[158] Given that text, it is incorrect to assert that the FCC did not address whether to count digital equivalents as "business lines." Indeed, as AT&T has already pointed out, XO – which is a CLEC party here – filed a petition for reconsideration of the *TRRO* asking the FCC to change its rule on business lines,[159] precisely because XO was displeased that Rule 51.5 currently "count[s] DS1s and other digital lines on a

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[155] *Id.* at 6 (quoting *TRRO* ¶ 158).

[156] Decision 06-01-043, at 11; *see* Chapman Direct at 22 (pointing out that AT&T does not possess such usage information).

[157] CLEC Br. at 98.

[158] 47 C.F.R. § 51.5 (emphasis added).

[159] *See* CLEC Petition for Reconsideration at 10-21, 26.

per 64 kbps-equivalent basis"[160] and "counts every *DS1 provided by CLECs as 24 business lines*."[161] Here again, the CLECs do not acknowledge, much less attempt to explain, this point.

Third, the CLECs claim that there is a "huge discrepancy between the line counts AT&T reported to the FCC in 2003" during the course of the proceeding that lead to the *TRRO* "and the line counts it has produced for the Commission in this proceeding."[162] But this is not a "bait-and-switch," as the CLECs claim.[163] The line counts AT&T provided to the FCC were provided *before* the FCC released its rule dictating how business lines should be counted. Beyond that, AT&T subsequently notified the FCC in a publicly available letter of its counting methodology – which AT&T California adopted specifically because the FCC's rules directed AT&T California to count business lines in this fashion – and the FCC has done nothing to suggest that AT&T's methodology was incorrect.[164]

Fourth, AT&T has pointed out that it "does not possess the data necessary to determine what service, if any, the CLEC is actually providing to the end user over the UNE-L Loops that AT&T California has provided."[165] Similarly, the Texas federal district court found that "data on actual end use is not readily verifiable by the FCC, nor is it objective," and that the "evaluation of such data would be unworkable."[166] The CLECs counter with the barebones argument that "complying" with the FCC's rule "is not optional."[167] This observation is true enough, but it supports AT&T's position: The last sentence of Rule 51.5 specifies that each DS1 will count as

[160] *Id.* at 11.

[161] *Id.* at 13 (emphasis added).

[162] CLEC Br. at 99.

[163] *Id.*

[164] *See* Chapman Direct at 16.

[165] *Id.* at 22.

[166] Texas Decision at 7 (citing *TRRO* ¶ 105).

[167] CLEC Br. at 102.

24 "business lines."[168] Thus, as the Texas court found, the CLECs' "argument is without merit" because the rule "is unqualified and suggests no exceptions or limitations."[169]

Fifth, the CLECs reiterate their suggestion that rather than counting DS1s as 24 "business lines" as Rule 51.5 commands, the Commission should substitute an approach in which it would weight the business line count by a 50% factor.[170] This approach finds no support in the rule, which contains no suggestion that the counting of 64 kbps-equivalents should be limited by a utilization factor. And, as AT&T California has pointed out – again, in a passage that the CLECs ignore – the CLECs' proposed utilization factor could not be adopted without discovery into the business practices of every CLEC in California.[171] Such a process would, in turn, contradict the FCC's holding that its framework was "based upon *objective and readily obtainable facts*."[172] The CLECs have no answer to this point, and, indeed, they themselves continue to treat any information related to CLEC usage of business lines as confidential.[173]

Finally, referring to an earlier debate about the distinction between mass market and enterprise switching, the CLECs suggest that "AT&T itself believes that . . . CLECs can begin serving a customer with DS1 service via UNE-L when that customer purchases only 4 business lines."[174] But AT&T California's earlier argument had to do with when a CLEC could economically buy a DS1. It had no bearing on how CLECs use the DS1s that they purchase, much less the proper interpretation of the FCC's "business line" rule.

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[168] 47 C.F.R. § 51.5.

[169] Texas Decision at 7.

[170] *See* CLEC Br. at 102-04.

[171] *See* Chapman Rebuttal at 31.

[172] *TRRO* ¶ 234 (emphasis added); *see also id*. ¶¶ 93, 105, 108, 161.

[173] *See* CLEC Br. at 104.

[174] *Id.*

ii. How should digital UNE-P lines be counted under the FCC's definition of business line?

The CLECs would have this Commission apply their 50% utilization factor not only to UNE-L, but also to UNE-P. As AT&T California has explained, even assuming the CLECs' proposal had merit with respect to stand-alone UNE loops (it does not), it has no application to UNE-P, where AT&T is, by definition, providing the switching.[175] The CLECs do not dispute the point.

iii. Should UNE lines be counted in the same manner as AT&T's retail active voice grade circuits?

The CLECs contend that AT&T has acted inconsistently in the way that it counts retail lines *vis-à-vis* the CLECs' lines.[176] That is, if AT&T's own business customer purchases a DS1 and uses half of the digital equivalents for voice service, "AT&T would report a business line count of 12 under ARMIS rules," but if that same package were sold to a CLEC, AT&T would "now report this DS1 as carrying 24 business lines even though nothing has changed."[177] The CLECs further accuse AT&T of "sleight-of-hand" and "artfully us[ing] telecommunications jargon to conceal the truth" about this issue.[178]

The CLECs are wrong. As Ms. Chapman explains:

> [I]n the ARMIS 43-08 counts, if AT&T California has provided a retail or resale customer with a full DS1 line, AT&T California will count the DS1 as 24 equivalent lines as required by the ARMIS 43-08 reporting rules. If AT&T California has provided a retail or resale customer with a single voice-grade line that simply happens to be provisioned over a larger facility, AT&T California will only count the single line. The same is true for UNE Loops. If AT&T California has provided a full DS1 loop to a requesting CLEC, AT&T California will count that loop as 24 equivalent lines. If AT&T California has provided a single voice-

[175] *See* AT&T California Initial Br. at 60-61; Chapman Rebuttal at 32.

[176] *See* CLEC Br. at 100-01.

[177] *Id.* at 101.

[178] *Id.* at 102.

> grade loop to a CLEC, but has provisioned that loop over a DS1 facility, AT&T California will only count the voice-grade loop it has provided.[179]

This testimony, moreover, is fully consistent with AT&T California's discussion of this point in its initial brief (at 62-63), and, apart from pejorative labels, the CLECs offer no answer to it.

C. Should business switched access lines provided under a commercial agreement be counted as business lines under the FCC's definition of business line?

The CLECs emphasize that "the FCC did not mention commercial lines" in Rule 51.5.[180] But the relevant point is that lines provided under a commercial arrangement fall within Rule 51.5's phrase "all incumbent LEC business switched access lines."[181] The CLECs concede that "this argument seems reasonable" but nonetheless contend that commercial arrangements should be excluded "when viewed through the lens of what the FCC actually chose to include and exclude from its Business Line definition."[182] Here, the CLECs refer to the fact that the FCC "specifically rejected the inclusion of tariffed special access services in its line count definitions."[183] This proves the opposite. Given that the FCC excluded "non-switched special access lines," it could have similarly excluded commercial-agreement lines if it had wanted to do so. Instead, the rule includes *all* "access lines connecting end-user customers with incumbent

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[179] Chapman Rebuttal at 25.

[180] CLEC Br. at 105.

[181] 47 C.F.R. § 51.5; *see* Chapman Rebuttal at 42-43.

[182] CLEC Br. at 106.

[183] *Id.*

LEC end-offices for switched services,"[184] a phrase that, as Ms. Chapman explains, precisely fits lines provided under commercial agreements.[185]

The CLECs also contend that, whereas the FCC's intent in counting business lines was supposedly to measure competitive deployment, lines provided under a commercial agreement "provide evidence of exactly the opposite," purportedly because "a carrier would only enter into a commercial business line agreement with the ILEC in places where it was economically impossible to build its own facilities or find a cheaper competitive offering."[186] In fact, the FCC's business line criterion was meant to capture revenue opportunities, not competitive deployment.[187] Viewed from that perspective, lines provided under a commercial agreement are no different than any other "incumbent LEC business switched access lines."[188] What is more, the CLECs' logic would also require the exclusion of UNE loops and resold lines, both of which (like lines provided under a commercial agreement) are required to be included under Rule 51.5.

D. Taking all relevant factors into consideration, are the Business Line Counts identified by AT&T California appropriate? If not, what adjustments to the Business Line Counts should be made?

AT&T California's business line counts are appropriate and in keeping with precedent from the FCC, the Texas federal district court, and this Commission. No adjustments are needed.

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[184] 47 C.F.R. § 51.5.

[185] *See* Chapman Rebuttal at 31-32.

[186] CLEC Br. at 107.

[187] *See*, *e.g.*, *TRRO* ¶ 103 ("Business line density also is an administrable proxy for determining where significant revenues are available sufficient for competitors to deploy transport facilities . . . . Wire centers that possess a high level of demand for telecommunications services are most likely to attract and support competing carrier transmission facilities . . . .").

[188] 47 C.F.R. § 51.5.

III. Based on the Commission's determinations for the issues presented in Parts I and II above, what are the appropriate classifications for the wire centers at issue in this proceeding?

AT&T California's wire center designations, as shown in the attachments to Ms. Chapman's direct testimony, are appropriate and should be adopted. As AT&T California has explained,[189] if and to the extent the Commission disagrees with any of the methodological or factual determinations that underlie those designations, AT&T California will submit revised designations that reflect the Commission's decision.[190]

CONCLUSION

The Commission should approve AT&T California's March 11, 2005 wire center designations.

[189] *See* Chapman Rebuttal at 74; AT&T Initial Br. at 65.

[190] The CLECs assert that it "border[ed] on misconduct" for AT&T California, in reliance on *Verizon Communications, Inc. v. FCC*, 535 U.S. 467 (2002), to describe the TELRIC rates that apply to UNEs as "nearly confiscatory." CLEC Br. at 15-18; *see* AT&T Initial Br. at 1. This claim is curious (even apart from the fact that it has little to do with the issues in this proceeding). In upholding TELRIC as a lawful ratesetting methodology, the Supreme Court described it as "novel ratesetting designed to give aspiring competitors *every possible incentive to enter local retail telephone markets, short of confiscating the incumbents' property*." *Verizon*, 535 U.S. at 489 (emphasis added). Beyond that, one would have thought it was common ground by now that TELRIC rates are, in the words of the FCC's former Chairman, "subsidized and below costs." *See* J. Pelofsky, *Michael Powell on Monday Moved To Dampen Speculation He Plans To Leave*, Reuters (Aug. 19, 2003) (quoting then-FCC Chairman Michael Powell). As the D.C. Circuit has observed, if that were not the case, the CLECs' "ardent preference[]" for a "broad" reading of the 1996 Act's unbundling obligations would be difficult to explain. *USTA II*, 359 F.3d at 562; *see also id.* at 573 (noting that requiring unbundled access to ILEC facilities at TELRIC rates in "competitive markets" is akin to using "an ILEC . . . as a piñata").

Respectfully submitted,

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November 27, 2006

Reply Exh. 1

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
AUSTIN DIVISION

LOGIX COMMUNICATIONS L.P. d/b/a Logix Communications,

Plaintiff,

-vs-

Case No. A-06-CA-548-SS

THE PUBLIC UTILITY COMMISSION OF TEXAS, et al.,

Defendants.

ORDER

BE IT REMEMBERED on the 6th day of November 2006, the Court reviewed the file in the above-styled cause, and specifically Plaintiff Logix Communications's Motion for Summary Judgment [#20] and Defendants AT&T Texas and the Public Utility Commission of Texas's Responses thereto [#21, #22]. Having reviewed the motion and responses, the case file as a whole, and the applicable law, the Court is of the opinion that the decision of the Public Utility Commission of Texas in Docket No. 31303 should be upheld for the reasons set forth below.

Background

The Federal Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56, codified at 47 U.S.C. § 251 et seq., seeks to create a more competitive telecommunications market by (among other things) requiring incumbent local exchange carriers ("ILECs") to provide their competitors ("CLECs") access to certain elements of the ILECs' infrastructure at substantially discounted, cost-based rates in some circumstances. 47 U.S.C. § 251(c)(3). The term used in the industry to describe such a piece of the network is "unbundled network element" or "UNE." The Federal

Communications Commission ("FCC") has promulgated rules to determine when access to UNEs should be provided. 47 C.F.R. §51.1 et seq. These rules are explained in the FCC's *Triennial Review Remand Order*, 20 FCC Rcd. 2533 (2005). In essence, the FCC requires ILECs to provide CLECs access to UNEs when failure to do so would impair competition. *See* 47 U.S.C. § 251(d)(2)(B). This "impairment analysis" is "based on the volume of business being done in a particular area." *Cbeyond Communications L.P. v. Pub. Util. Comm'n.*, No. A-05-CA-862-SS (W.D. Tex., Jan. 24, 2006). In theory, if the volume of business in an area is high, "the CLEC has the incentive to install and operate its own fiber facilities, and thus, there is no reason to require the ILEC to provide them." *Id.*

Under section 252 of the Federal Telecommunications Act ("FTA"), ILECs are obligated to negotiate interconnection agreements with CLECs regarding the use of ILEC infrastructure. 47 U.S.C. § 252(a). Any party to such negotiations may compel arbitration before a state utilities commission. *Id.* at § 252(b). The parties may appeal the state commission's decisions to a federal district court, *Id.* at § 252(e)(6), which will review the FTA issues de novo. *Southwestern Bell Tel. Co. v. Pub. Util. Comm'n*, 208 F.3d 475, 482 (5th Cir. 2000).

On June 30, 2005, AT&T Texas ("AT&T") initiated an arbitration proceeding before the Public Utility Commission of Texas ("PUCT") regarding its interconnection agreement with Logix Communications ("Logix"), seeking "post-interconnection agreement dispute resolution regarding unbundled netowork elements ("UNE") declassification by wire center." Compl. ¶ 13. AT&T sought to establish that its method for determining the volume of business, and thus the necessity for UNE access, in the Texas market is correct. Logix now appeals the PUCT's decision in that case.

Logix raises two issues on appeal: (1) In determining the number of "business lines" at a particular wire center, should the count include all UNE Loops connected to that wire center, or only the UNE Loops that can be shown to serve business clients? Logix contends the Commission erred in holding that all UNE Loops should be counted. (2) In determining the number of "business lines" at a particular wire center, should each 64-kbps-equivalent in a high capacity loop be counted as one business line, or should the count be limited to the capacity actually used to serve business customers? Logix contends the Commission erred in holding that actual use is irrelevant and each 64-kbps-equivalent should count as one business line.

Analysis

The dispute in this case centers around the proper interpretation of FCC Rule 51.5, concerning the regulatory definition of a "business line." 47 C.F.R. § 51.5. The number of business lines in a wire center is used to establish the thresholds at which market competition is considered "impaired" for purposes of UNE access. 47 C.F.R. § 51.319(a)(4)–(5). The rule states in relevant part,

> A business line is an incumbent LEC-owned switched access line used to serve a business customer, whether by the incumbent LEC itself or by a competitive LEC that leases the line from the incumbent LEC. The number of business lines in a wire center shall equal the sum of all incumbent LEC business switched access lines, plus the sum of all UNE loops connected to that wire center, including UNE loops provisioned in combination with other unbundled elements. Among these requirements, business line tallies:
> (1) Shall include only those access lines connecting end-user customers with incumbent LEC end-offices for switched services,
> (2) Shall not include non-switched special access lines,
> (3) Shall account for ISDN and other digital access lines by counting each 64 kbps-equivalent as one line. For example, a DS1 line corresponds to 24 64 kbps-equivalents, and therefore to 24 "business lines."

Id.

The FCC, by the plain language of this rule, has determined that "[t]he number of business lines in a wire center shall equal the sum of all incumbent LEC business switched access lines, plus the sum of all UNE loops connected to that wire center." 47 C.F.R. § 51.5. Logix contends this language is qualified by the phrase that precedes it: "A business line is an incumbent LEC-owned switched access line used to serve a business customer." *Id.* Therefore, Logix argues, the phrase "all UNE loops connected to that wire center" must be read to include only the UNE Loops that can be shown to serve business clients.

This argument fails to consider the simple fact that the rule identifies the number of business lines in a wire center as "the sum of all incumbent LEC *business switched access lines*, plus the sum of *all UNE loops* connected to that wire center." This grammatical structure indicates the FCC wished to include only business switched-access lines, but wished to count all UNE loops. This interpretation is further supported by the next clause in the sentence: "the sum of all incumbent LEC *business switched access lines*, plus the sum of *all UNE loops* connected to that wire center, *including UNE loops provisioned in combination with other unbundled elements.*" The FCC explicitly intended to count all UNE loops, not just those "provisioned in combination with" business lines.

This reading of the rule is further supported by the FCC's *Triennial Review Remand Order*. 20 FCC Rcd. 2533. The FCC has explained that it relies on data available from the preexisting FCC filings required of incumbents in determining how to establish the number of business lines in a wire center. *Triennial Review Remand Order*, 20 FCC Rcd. 2533 at ¶ 105. The FCC specifically chose this approach to avoid the problems inherent in its previously-overturned unbundling rules. *See U.S.*

Telecom. Ass'n v. FCC, 359 F.3d 544, 573–74 (D.C. Cir. 2004). In *U.S. Telecom*, the D.C. Circuit limited the FCC's ability to "subdelegate" the evaluation of subjective impairment criteria to state authorities, and also directed the Commission to consider in its impairment evaluation not only actual competition within a given market but also potential competition in that market. *Id.*; *see also Triennial Review Remand Order*, 20 FCC Rcd. 2533 at ¶ 156. The FCC reasoned that "these two directives effectively preclude our reliance on a building-specific approach" to the impairment analysis. *Id.* A case-by-case evaluation of impairment would be impracticable for two reasons: first, much of the more detailed data on competitive use is solely in the possession of CLECs, who "may (1) have no interest in the outcome of the analysis, and thus little incentive to provide the relevant information, or (2) desire to retain unbundling within the building . . . and thus would have an explicit incentive to avoid cooperating." *Id.* at ¶ 158, n.442. Second, the evaluation of that data would be unreasonably subjective. "Even if these factors could be reasonably enumerated, it is inevitable that incumbent LECs and competitive LECs would engage in disputes over many of them, building-by-building, raising the prospect of expensive, fact-intensive litigation for years to come." *Id.* at ¶ 159.

Therefore, the FCC "conclude[d] that such detailed and potentially subjective building-by-building *and loop-by-loop* evaluations . . . are not practical." *Id.* Instead, the FCC chose to base its business line count on data established by objective ILEC filings, reasoning that "by basing our definition [of business line counts] in an ARMIS filing required of incumbent LECs, and adding UNE figures, which must also be reported, we can be confident in the accuracy of the thresholds, and a simplified ability to obtain the necessary information." *Id.* at ¶ 105. The ARMIS and UNE figures are not only "objective and readily available," *id.* at ¶ 161, but are also good indicators of both

actual and potential competition in a given market, because the existence of the fiber facilities reported in these filings is "the factor that most prominently determines whether construction of a competitive facility is economic." *Id.*

The approach advocated by Logix would require the exact loop-by-loop analysis rejected in the FCC's Order. Logix argues only UNE loops serving business customers should be counted in the business line tally, but this information is not readily available to or verifiable by the FCC. ILECs do not generally report or even have information on how CLECs use their UNE loops. Thus, this is exactly the type of information the FCC found impractical: it is " not easily verifiable, and is often exclusively within the possession of competitive LECs, many of which have little incentive to provide that information to regulators evaluating impairment." *Id.* at ¶ 158.

Logix points to this Court's decision in *Cbeyond Communications L.P. v. Pub. Util. Comm'n.*, arguing that notwithstanding the analysis explained in the FCC's Order, the intent expressed in the order must yield to the unambiguous language of the final regulation. No. A-05-CA-862-SS (W.D. Tex., Jan. 24, 2006). *Cbeyond* concerned an FCC regulation that was "facially irreconcilable" with the text of the *Triennial Review Remand Order*. *Id.* In that situation, this Court held that "when the FCC makes inconsistent statements in an order and a regulation, it is the language in the regulation—not the order—that is controlling." *Id.* The regulation and order at issue today are not irreconcilable; the order explains and supports the plain meaning of the regulation. Therefore, the PUCT's decision that all UNE loops in a wire center should be counted to establish the number of business lines in that wire center is correct.

Logix raises essentially the same textual argument in asserting that the rule's requirement that business line tallies "(3) [s]hall account for ISDN and other digital access lines by counting each 64

kbps-equivalent as one line" is properly limited to 64 kbps-equivalents actually used by business customers. This argument is without merit. The sentence itself is unqualified and suggests no exceptions or limitations. Moreover, as explained above, data on actual end use is not readily verifiable by the FCC, nor is it objective. The FCC has rejected such a detailed approach, recognizing that "although it may provide a more complete picture," the evaluation of such data would be unworkable. *Triennial Review Remand Order* at ¶ 105. The PUCT's holding that each 64 kbps-equivalent shall be counted as one business line is supported by both the text of the regulation and the intent expressed in the *Triennial Review Remand Order*.

Conclusion

In accordance with the foregoing,

IT IS ORDERED that Plaintiff Logix Communications' Motion for Summary Judgment [#20] is DENIED.

IT IS FURTHER ORDERED that summary judgment in favor of Defendants IS GRANTED.

IT IS FINALLY ORDERED that any remaining motions in this case are DISMISSED AS MOOT.

SIGNED this the 6th day of November 2006.

SAM SPARKS
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
AUSTIN DIVISION

LOGIX COMMUNICATIONS L.P. d/b/a Logix Communications,

Plaintiff,

-vs-

Case No. A-06-CA-548-SS

THE PUBLIC UTILITY COMMISSION OF TEXAS, et al.,

Defendants.

JUDGMENT

BE IT REMEMBERED on the 6th day of November 2006 the Court entered its order granting summary judgment on behalf of the defendants, the Court enters the following:

IT IS ORDERED, ADJUDGED, and DECREED that the plaintiff Logix Communications TAKE NOTHING in this cause against the defendants Public Utility Commission of Texas, et al., and that all costs of suit are taxed against the plaintiff, for which let execution issue.

SIGNED this the 6th day of November 2006.

Sam Sparks
SAM SPARKS
UNITED STATES DISTRICT JUDGE

P

Reply Exh. 2

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
AUSTIN DIVISION

LOGIX COMMUNICATIONS L.P. d/b/a Logix Communications,

Plaintiff,

-vs-

Case No. A-06-CA-548-SS

THE PUBLIC UTILITY COMMISSION OF TEXAS, et al.,

Defendants.

ORDER

BE IT REMEMBERED on the 15th day of November 2006, the Court reviewed the file in the above-styled cause, specifically Plaintiff's Motion to Alter Judgment or Reconsider and Vacate Judgment [#25]. On November 6, 2006, this Court granted summary judgment in favor of Defendants after considering Plaintiff's Motion for Summary Judgment and Defendants' Responses thereto. In reaching this decision, the Court carefully reviewed a voluminous record. The Plaintiffs, in support of the motion, entered over one hundred pages of exhibits, including everything from testimony before the Public Utility Commission to pages from the American College Dictionary. Each Defendant was equally thorough in response.

Nonetheless, Plaintiff maintains this decision was entered on an incomplete record, because the Court entered judgment before Plaintiff filed a reply to the Defendants' responses. Under the Local Rules, responsive pleadings are normally due ten days after the pleading to which they respond. The Court, however, entered a Scheduling Order in this case allowing Plaintiff to file a reply no later than November 10, 2006, one full month after Defendants' responses were due. The

Court overlooked this order when it entered summary judgment in favor of defendants on November 6, 2006, four days before the due date for a reply. This was an error on the Court's part, which Plaintiff now seeks to correct by filing this Motion to Alter Judgment or Reconsider and Vacate Judgment.

"The motion to reconsider 'is found nowhere in the Federal Rules of Civil Procedure.'" *Beijing Sansheng Dev. Corp. v. Advertisement Tech. Corp.*, SA-01-CA-0522 NN, 2005 U.S. Dist. LEXIS 8529 (W.D. Tex. 2005) (quoting *State of Lousianna. v. Sprint Commc'ns Co.*, 899 F. Supp. 282, 284 (M.D. La. 1995)). In the interests of justice, however, most courts allow motions to reconsider in one form or another. *Id* (citing Fed. R. Civ. P. 8(f)). Here, Plaintiff asks the Court to alter or vacate its judgment pursuant to Fed. R. Civ. P. 59(e), which allows a court to amend its judgment within ten days of entry. There are only three grounds for granting a Rule 59(e) motion: "(1) an intervening change in controlling law; (2) the availability of new evidence not previously available; or (3) the need to correct a clear error of law or prevent manifest injustice." *In re Benjamin Moore & Co.*, 318 F.3d 626, 629 (5th Cir. 2002). Thus, although the Court regrets the inconvenience to the parties, Plaintiff is not relieved of its burden to show the Court's clear error in scheduling is also a clear error of law. "[R]ulings should only be reconsidered where the moving party has presented substantial reasons for reconsideration." *Sprint Commc'ns Co.*, 899 F. Supp. at 284.

Plaintiff argues the Court's premature entry of judgment prevented Plaintiff from completing the appellate record, because Plaintiff relied on the Court's representation that it would have the opportunity to supplement the record in a reply brief. Specifically, Plaintiff would have entered further PUCT hearing testimony and an exerpt from a favorable decision of the North Carolina

Utilities Commission in a similar case in support of its reply. The Court notes that these documents are now part of the record as exhibits attached to Plaintiff's motion for reconsideration. The Court further notes that "litigants are expected to present their strongest case when the matter is first considered." *Texas Instruments*, 50 F. Supp. 2d at 621 (quoting *Sprint Commc'ns,* 899 F. Supp. at 284). Nevertheless, in the interests of justice, the Court will consider the merits of Plaintiff's reply brief and exhibits in support thereof.

The Court is unconvinced by these materials. Plaintiff's reply simply reurges the arguments presented in its motion for summary judgment. The exhibits support this vigorously presented argument, but they do not shed new light on the issue. In particular, although the reasoning of the North Carolina Utilities Commission, presented in support of Plaintiff's reply, is well articulated, it is not binding on this Court. The Court is persuaded, instead, by the reasoning of the Alabama, California, Florida, Georgia, Illinois, Indiana, Kansas, South Carolina, Ohio, Utah, and Washington, D.C. utilities commissions, which this Court followed in its November 6th, 2006 summary judgment order.

Plaintiff alleges two other "clear errors" in the Court's November 6, ruling. First, Plaintiff asserts the Court erroneously interpreted the FCC rule defining a business line. Plaintiff is simply repeating the arguments expounded at length in its earlier filings. "Motions to reconsider 'based on recycled arguments only [serve] to waste the resources of the court,'" *Texas Instruments, Inc. v. Hyundai Elec. Indus., Co.*, 50 F. Supp. 2d 619, 621 (E.D. Tex. 1997) (quoting *Sprint Commc'ns*, 899 F. Supp. at 284. Plaintiff's second argument, that this Court's ruling in *Cbeyond v. Public Util. Comm. of Texas*, No. A-05-CA-862-SS (January 24, 2006) dictates Plaintiff's desired result in this case, is likewise stale. This Court carefully considered both of Plaintiff's arguments based on the

able and detailed filings of all the parties in its November 6th, 2006 summary judgment order. Motions to reconsider "are not the proper vehicle to '[rehash] old arguments.'" *Texas Instruments*, 50 F. Supp. 2d at 621 (quoting *Resolution Trust Corp. v. Holmes*, 846 F. Supp. 1310, 1316 (S.D. Tex. 1994)). Because Plaintiff has failed to establish the Court's November 6, 2006 judgment contained a clear error of law, the motion for reconsideration must be denied.

In accordance with the foregoing,

IT IS ORDERED that Plaintiff's Motion to Alter the Judgment or Reconsider and Vacate Judgment [#25] is DENIED.

IT IS FURTHER ORDERED that all other pending motions in the above-styled case are DISMISSED AS MOOT.

SIGNED this the 15th day of November 2006.

Sam Sparks

SAM SPARKS
UNITED STATES DISTRICT JUDGE

CERTIFICATE OF SERVICE

I, Hugh Osborne, hereby certify the following:

I am a citizen of the United States, State of California, am over eighteen years of age, and am not a party to the within cause.

My business address is 525 Market Street, San Francisco, California 94105.

On November 20, 2006, I sent copies of the foregoing REPLY BRIEF OF AT&T CALIFORNIA (U 1001 C) ON DISPUTED WIRE CENTER ISSUES in C.06-03-023 to each party named via electronic mail, U.S. mail, or hand-delivery.

Executed this 27th day of November 2006 in San Francisco, California.

AT&T CALIFORNIA
525 Market Street
San Francisco, CA 94105

/s/
Hugh Osborne

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